

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 3631**

Heard in Montreal, Wednesday, 12 September 2007

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**RAIL CANADA TRAFFIC CONTROLLERS**

**EX PARTE**

**DISPUTE:**

The termination/discharge of Rail Traffic Controller Todd Lammi.

**COMPANY'S STATEMENT OF ISSUE:**

Mr. Lammi's employment was terminated effective May 4, 2007 following an absence of ninety-four days that commenced January 31, 2007.

The termination of Mr. Lammi commenced with an incident that occurred when RTC Chief Larry Sbrega approached Mr. Lammi at his assigned Rail Traffic Control desk to review an operating issue. This action provoked a confrontational reaction by Mr. Lammi with Supervisor Sbrega and he subsequently requested that the CN Police respond to the RTC Office. During this incident, Mr. Lammi declared himself to be "unfit for duty". Mr. Lammi is responsible to work in a safety critical environment and, as a result of the incident, he was advised that he would require clearance by CN Occupation Health Services prior to returning to service.

Following the date of the incident, January 31, 2007, Mr. Lammi was absent from active service for the period February 1, 2007 to the date of his termination, May 4, 2007.

It is the Company's position that Mr. Lammi is solely accountable for his extended period of absence. Multiple attempts were undertaken to communicate to Mr. Lammi that his return to service would require that he attend Occupational Health Service for an assessment of his fitness to protect an assignment as a Rail Traffic Controller. Mr. Lammi did not respond to the Company's directives and following an absence of ninety-four days, his employment was terminated.

The Company asserts that Mr. Lammi's termination was warranted and appropriate under the circumstances.

**UNION'S STATEMENT OF ISSUE:**

By letter dated May 4, 2007, Rail Traffic Controller Todd Lammi's employment was terminated.

The Union grieved the termination stating: the Company was in violation of s.124 of the *Canada Labour Code* and its duty to apply the collective agreement properly and fairly, failing to ensure a safe and healthy work environment for every person employed in the Toronto Rail Traffic Control Centre, harassment and violating Mr. Lammi's right to a fair and impartial hearing.

The Union demands that Rail Traffic Controller Lammi be immediately returned to service with no loss of seniority and be made whole for all lost wages and benefits.

The Company has denied the Union's request.

**FOR THE UNION:**

**(SGD.) J. RUDDICK**  
**GENERAL CHAIRMAN**

**FOR THE COMPANY:**

**(SGD.) D. VEENIS**  
**SENIOR MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

D. Veenis	– Sr. Manager, Labour Relations, Toronto
P. Orr	– Manager, RTCC, Toronto
P. Lavoie	– Manager, Corridor Operations, Toronto
L. Lisi	– CN Constable
T. Lee	– Manager, Corridor Operations, Toronto

And on behalf of the Union:

J. Ruddick	– General Chairman, Burlington
S. Brownlee	– Vice-General Chairwoman, Edmonton
D. Charbonneau	– Accredited Representative, Toronto
M. Boucher	– Local Chairman, Montreal
T. Lammi	– Grievor

**AWARD OF THE ARBITRATOR**

As a preliminary matter the Union submits that the grievor, Mr. Todd Lammi, was denied a fair and impartial hearing by the Company. The Arbitrator cannot sustain that submission. The record reveals that the investigation in the case at hand was extremely lengthy, extending over a substantial number of days. A review of the transcript of the investigation reveals that the grievor's Union representative objected to the questions put by the investigating officer with such a frequency that his interruptions appear on almost every page of a relatively extensive transcript. For the most part the objections raised by the representative, Mr. Denis Charbonneau, are either highly technical or entirely spurious or irrelevant. Mr. Charbonneau appears to have little grasp of the purpose and limitations of the disciplinary investigative process. (See, e.g., **CROA 2643** and **SHP 371**.)

In support of its submission the Union points to the fact that there was a technical difficulty whereby a portion of the transcript was lost and the proceedings needed to be repeated and the fact that allegedly the investigating officer declined the grievor and his Union representative an opportunity to verify the transcript of the final day of the investigation. The Arbitrator cannot accept these submissions. The investigating officer, Mr. Lee, explained, and the Arbitrator accepts, that he experienced substantial difficulty by reason of the objections and procedural wrangling introduced into the proceedings by the Union's representative, and rambling and irrelevant responses by the grievor. There was particular concern raised by the Union about a question which was introduced after the failure of the transcript recording equipment, and a strenuous refusal to allow that question to be answered. Faced with such problems the Company officer ultimately determined to simply end the investigation. When the Union officers indicated that they would not sign the final day's transcript Mr. Lee simply left transcripts with them for their own verification and closed the proceedings. In the circumstances I can see little alternative for the Company officer who, in the Arbitrator's view, acted in good faith in the face of unreasonable and excessive objections. Bearing in mind that a disciplinary investigation is not intended to be a full blown trial with repeated objections about the application of strict rules of evidence, I am satisfied that the grievor was afforded a fair and impartial investigation as contemplated by the collective agreement, and was given every opportunity to know the charge against him and to rebut it.

The record reveals that an incident occurred during the grievor's shift at the Toronto Rail Traffic Control Centre on January 31, 2007. When he was approached by Supervisor Larry Sbrega, Mr. Lammi took exception to what he viewed as the distracting influence of Mr. Sbrega's attendance at his work station while he was handling trains on the radio. When he related the incident to the on duty supervisor, Mike Brown, Mr. Brown had the unfortunate first reaction of laughing, which apparently only further upset Mr. Lammi. He then contacted the CN Police. When RTC Supervisor Patti Lavoie attempted to intervene, Mr. Lammi ceased speaking with her when the CN police constable arrived. After providing a report to the police officer Mr. Lammi left the workplace, declaring himself to be unfit for duty.

The following day, when he re-attended at work, he was advised by Supervisor Pat Orr that he would need medical clearance before being able to return to work. Mr. Lammi left work, and remained absent from February 1,

2007 through May 4, 2007, the date he was ultimately terminated. The Company takes the position that the grievor was under an obligation to get his health services clearance and return to work, and that his failure to do so constituted an eventual abandonment of his position. The grievor maintains, apparently based on a telephone message left by General Superintendent Ron Zimmerman, that he was under no obligation to undergo the medical assessment until such time as a formal investigation was conducted into the incident surrounding his departure from work on January 31, 2007. It is common ground that the investigation was substantially delayed, in part by a strike which was then occurring and the fact that there was some difficulty locating a supervisory officer who could give the grievor an unbiased and fair hearing. It also appears that Mr. Lammi insisted on having some explanation as to why he should submit to a medical examination, presumably believing that that would be cleared up during the course of the Company's investigation.

The Arbitrator has some difficulty with this aspect of the Union's case. While it would appear true that Mr. Zimmerman left a message to the grievor indicating that he might contact medical services either before or after the investigation, it is in my view bordering on sharp practice for the Union to suggest that the Company essentially left that question indefinitely to the grievor's own discretion. The record clearly indicates that subsequent to Mr. Zimmerman's message a substantial number of messages were left with the grievor, many of which went unanswered, making it clear that he must contact the Occupational Health Services for clearance to return to work. That is made clear by the message left by Ms. Lavoie on the grievor's telephone on February 15, and is abundantly clear in a registered letter sent by Mr. Zimmerman to Mr. Lammi on February 20, indicating that the Company viewed his current status as "AWOL" and directing him to contact Supervisor Lavoie to deal with his return to service. For reasons he best appreciates, the grievor simply did not respond to these message and, it would appear, did not collect or accept certain of the registered mail letters sent to him by the Company.

As complex and convoluted as the facts presented by the Union may appear, the essence of this grievance is relatively simple. The grievor engaged in a verbal altercation with a supervisor on January 31, 2007, summoned the CN Police to the premises and left work in an obviously agitated state, indicating that he was unfit for duty. The Arbitrator accepts that in those circumstances the Company was justified in requiring medical evidence that the grievor was fit to return to what is an obviously highly safety-sensitive position. Thereafter the grievor engaged in a sustained pattern of evasion when attempts were made by the Company to contact him, and eventually clung to a questionable belief that he, and he alone, had the fullest discretion as to whether to attend for the medical clearance or not, depending on the scheduling of his disciplinary investigation. As explained above, he had no reasonable or credible basis to hold such a position, certainly after February 20, 2007.

The disciplinary investigation process got under way in March and April of 2007. Nevertheless Mr. Lammi continued to refuse to attend at Occupational Health Services to obtain medical clearance to return to work. He also failed to appear for an investigation on April 23, 2007. These events led the Company to issue a letter of clear warning dated April 24, 2007 addressed to the Union's General Chairperson, reading in part as follows:

As you are aware Mr. Lammi has been absent from service since January 31, 2007. He remains absent from service and this extended absence and his failure to comply with the requirement that he attend a medical assessment through Occupational Health Services has been the subject of formal investigation.

In association with these ongoing circumstances, Mr. Lammi was personally issued letters dated April 13 and April 16 advising him of a deadline to make contact with Occupational Health Services. Mr. Lammi has failed to contact Occupational Health Services as directed and he has additionally failed to attend an investigation scheduled for April 23 at 13:00 hours, to inquire into his failure to comply with the directives and to meet the dealing set out in writing.

As a result, Mr. Lammi has been issued an additional Notice to Appear to address his failure to attend the investigation scheduled for April 23, 2007. If Mr. Lammi fails to appear at that investigation, or provide just and sufficient reasons why he cannot appear, the Company will commence administrative procedures to close Mr. Lammi's employment record, as he will be deemed to have abandoned his assignment and failed to answer to our requests to provide a suitable explanation.

Finally, on May 4, General Superintendent Zimmerman wrote to Mr. Lammi advising:

Based on your failure to provide the Company with any explanation for your failure to contact O.H.S. and your failure to attend two formal investigations, your employment with the Company

is terminated effective immediately as you have abandoned your assignment and severed your employment contract with CN.

In the Arbitrator's view the Company was well justified in its view that the grievor had effectively abandoned his employment. His repeated refusal to undergo a medical clearance to return to his safety-sensitive position gave the Company little alternative but to hold him from service. His continuing refusal, for an indefinite period of time, did, in the Arbitrator's view, finally justify the view that he had abandoned his employment.

The Union argues, in part, that the grievor is the victim of a poisoned workplace in which management repeatedly abuses employees in a work setting already made excessively stressful by the fact that the complement of employees has been reduced by some 25%, a situation which the Union's representative characterizes as extremely dangerous. While the Arbitrator can appreciate the Union's perception, the issue so raised is beyond the scope of this grievance. There is no evidence whatever of a medical or psychiatric nature supporting the suggestion that Mr. Lammi was unable to respond to the Company's requests by reason of any medical or psychological incapacity. Moreover, the broad allegations of management abuse at the Toronto Rail Traffic Control Centre are obviously more appropriately addressed in a policy grievance dealing with that specific allegation or in a properly framed complaint before a statutory tribunal properly charged with issues of workplace harassment and the obligation to maintain a safe and healthy work environment.

In the result, the Arbitrator cannot dispute that the Company did have reasonable grounds to conclude that the grievor would not comply with the directive to obtain medical clearance before his return to active duty, that he remained absent from work by reason of that refusal and that he had therefore effectively abandoned his employment.

A close review of the record, however, suggests that there are mitigating factors to be considered in the case at hand. Mr. Lammi is an employee of some twenty-one years' service. That service has been extremely positive, to the point that he was once promoted into a management position. He has had no discipline over a substantial number of years and is recognized as a good employee. On that basis the Arbitrator is persuaded that it is appropriate to direct that the grievor be reinstated, without compensation for any wages and benefits lost, in an effort to afford him an opportunity to demonstrate that he can perform the functions of his job and be responsive to the requests of management, even if he should not agree with them, effectively applying the work now – grieve later principle.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages and benefits lost. Mr. Lammi's return to work shall, however, be conditioned upon his obtaining the appropriate medical clearance. Should there be any dispute between the parties concerning the interpretation or implementation of this award the matter may be spoken to.

September 17, 2007

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**